IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 79 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KUMUDBEN JAYANTILAL MISTRY - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR AD SHAH for Applicant(s) : 1,
Mr SS Patel, Addl.PUBLIC PROSECUTOR for Respondent(s) : 1,
MS NISHA M THAKORE for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 19/02/2007

ORAL JUDGMENT

1. Revisionist, the original accused person in Criminal Case No. 1683 of 1996 pending in the court

of learned JMFC, Gandevi, has called into question the order dated 22.1.1998 made below her application for discharge under section 258 of the Code of Criminal Procedure, 1973 (for short, "the Code"). It was contended in the application for discharge that the petitioner herein had given a post dated cheque against the promise of execution of a document of sale of immoveable property and upon failure of the complainant to execute the documents, the petitioner had stopped payment of the cheque in question. Thus, despite the clear understanding and instruction to the original complainant not to present the cheque for realization, the cheque having been presented and dishonoured, the petitioner had prayed for an order of discharge. The trial court, after consideration of the contentions of the parties, observed that there was a *prima facie* case for proceeding with the summons triable case under section 138 of the Negotiable Instruments Act, 1881 and since there was no reason to drop the proceedings, the application was rejected by the impugned order. Learned counsel for the petitioner fairly conceded that the application of the petitioner under section 258 of

the Code was, in view of subsequent amendment and clarification of the law by the Supreme Court, not maintainable and, therefore, *prima facie,* the revision application would not have been required to be entertained.

2. However, learned counsel Mr A.D. Shah vehemently argued that, in the facts and circumstances of the case, this court was required to exercise its extraordinary jurisdiction and inherent powers to quash the proceedings of the criminal case in the interest of justice as the court had clearly erred in taking cognizance of the offence in violation of the provisions of section 142 of the Negotiable Instrument Act, 1881 (for short, "the Act"). Since that submission of the learned counsel was based upon certain admitted facts and averments made in the complaint itself, the factual background, as far as it is relevant, may be recapitulated.

2.1. The cheque in question, dated 13.10.1996 for Rupees One Lakh, was drawn on State Bank of Saurashtra and presented for realization on

23.10.1996; it was returned on 24.10.1996 on account of instruction to stop payment and a legal notice on that basis was given on 2.11.1996. Thereafter, according to the complaint, the petitioner had orally instructed the complainant to again present the cheque after opening an account in the same branch of the same bank and, even as the complainant complied, the cheque was again returned on 18.11.1996 with the same endorsement that "payment was stopped". Again, notice dated 26.11.1996 was sent and served upon the accused person on 29.11.1996. That notice was replied after the period of limitation, on 17.1.1997 by which date, the complaint was presented on 27.12.1996.

2.2. Relying upon the above facts, it was contended for the petitioner that second presentation of cheque by the complainant and service of notice thereafter could not justify the filing of complaint on 27.12.1996. The complaint was required to be filed on or before 5.12.1996 and the complaint having been filed beyond the period of limitation prescribed under section 142 of the Act, the court could not

have legally taken cognizance of the offence. Learned counsel relied upon recent judgment of the Supreme Court in ***M/s.Prem Chand Vijay Kumar v. Yash Pal Singh and Anr.*** **(JT 2005 (5) SC 318)** wherein it is observed as under:

> ***"12. One of the indispensable factors to form the cause of action envisaged in section 138 of the Act is contained in clause (b) of the proviso to that section. It involves the making of a demand by giving a notice in writing to the drawer of the cheque "within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid". If no such notice is given within the said period of 15 days, no cause of action could have been created at all.***
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> ***13. Thus, it is well settled that if dishonour of a cheque has once snowballed into a cause of action it is not permissible for a payee to create another cause of action with the same cheque."***

2.3. Learned counsel also relied upon the observations in ***M/s.Pepsi Foods Ltd. v. Special Judicial Magistrate*** (AIR 1998 SC 128) to submit that,

nomenclature under which the petition is filed is not quite relevant and that does not debar the court from exercising its jurisdiction which otherwise it possesses. The provisions exist in the Code for revision and appeal but sometimes, for immediate relief, section 482 of the Code or Article 227 of the Constitution may have to be resorted to for correcting some grave errors that might have been committed by the subordinate courts.

3. Learned counsel Ms. Nisha M. Thakore, appearing for the respondent-original complainant, submitted that the petitioner could not be allowed to raise, for the first time, the issue of limitation which was not raised before the trial court and the impugned order being otherwise perfectly legal and justified, the present revision application was required to be rejected without entering into the new ground sought to be made out without any foundation in the trial court. She further submitted that the issue of limitation was consciously not raised in the trial court in the year 1998 in view of the interpretation prevailing at that time, as far as

fulfilment of the conditions under section 138 of the Act were concerned. However, in view of the difficulties faced by the complainants and the courts, the legislature has come forward with the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 wherein section 142 of the Act was amended so as to grant discretion to the court in the matter of condoning delay in filing of the complaint. She submitted that though that amendment came into force only w.e.f. 6.2.2003 it would have retrospective effect, as it touched upon only procedural aspect of the matter and did not create or extinguish any substantive right. It was submitted on that basis that now the Court could be considered to have found sufficient cause to take cognizance even as, at the relevant time, the law about starting point of limitation was neither clear nor settled and the petitioner had not raised any objection on that count. That contention was strongly opposed by learned counsel Mr Shah, who submitted that the right and remedy of the complainant were closed as soon as the period of limitation expired. He relied upon judgment of the

Supreme Court in ***New India Insurance Co.Ltd. v. Smt.Shanti Misra*** (AIR 1976 SC 237) and pointed out the following proposition:

> ***"7. .....Then, will the application be barred under sub-section (3) of section 110A? Our answer is in the negative and for two reasons:***
>
> ***(1) Time for the purpose of filing the application under section 110A did not start running before the constitution of the Tribunal. Time had started running for the filing of the suit but before it had expired the forum was changed. And for the purpose of the changed forum, time could not be deemed to have started running before a remedy of going to the new forum is made available.***
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> ***(ii) Even though by and large the law of***

***limitation has been held to be a procedural law, there are exceptions to this principle. Generally the law of limitation which is in vogue on the date of the commencement of the action governs it. But there are certain exceptions to this principle. The new law of limitation providing a longer period cannot revive that remedy. Nor can it suddenly extinguish vested right of action by providing for a shorter period of limitation.*"**

The above view was reiterated in ***Yeshwantrao Laxmanrao Ghatge & Anr. v. Baburao Bala Yadav*** **(AIR 1978 SC 941),** wherein the issue was whether the right to property in question had been extinguished or not. Mr Shah also relied upon the judgment of Privy Council in ***Mathukumalli Ramayya v. Uppalapati Lakshmayya*** (AIR (29) 1942 Privy Council 54) and judgment of the Supreme Court in ***State of Bombay v. Supreme General Films Exchange Ltd. (***AIR 1960 SC 980***),*** in support of the submission that ordinarily a suit would be governed by the law of limitation in

force when the suit was instituted; and an enactment putting new restrictions or imposing more onerous conditions upon the right to appeal impairs substantive right and the enactment which does so, is not retrospective unless it says so expressly or by necessary intendment.

4. In view of the above controversy sought to be resolved in the present proceedings and in view of absence of controversy about essential facts, it may be appropriate and necessary to appreciate the objects and reasons of amending the provisions of section of 142 and the effect thereof. According to the statement of objects and reasons for the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002, the existing provisions in the Act namely, sections 138 to 148 in Chapter XVII were found deficient in dealing with dishonour of cheques. Not only the punishment provided in the Act had proved to be inadequate, the procedure prescribed for the courts to deal with such matters was found to be cumbersome. Keeping in view the large number of complaints pending in various courts, a Working Group

was constituted to review section 138 of the Act and for making recommendations as to what changes were needed to effectively achieve the purpose of that section, and after considering the recommendations and other representations, and in consultation with the Reserve Bank of India and other legal experts, it was decided to bring out the amendments, *inter alia,* to allow discretion to the court to waive the period of one month, which was prescribed for taking cognizance of the case under the Act.

4.1. It is stated at page 570 in ***Volume 44 of Halsbury's Laws of England*** as under:

> "*The general rule is that all statutes, other than those which are merely declaratory or which relate only to matters of procedure or of evidence, are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature.....*"
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> *And at page 574 it is stated :*

> *"The presumption against retrospection does not apply to legislation concerned merely with matters of procedure or of evidence; on the contrary, provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of Parliament."*

4.2. As stated by Lord Denning in ***Blyth v. Blyth, (1966) 1 All ER 524,*** the rule that an Act of Parliament is not to be given retrospective effect applies only to statutes which affect vested rights. It does not apply to statutes which only alter the form of procedure or the admissibility of evidence, or the effect which the courts give to evidence. The Supreme Court has quoted with approval the reason of the rule as expressed in **MAXWELL**:

> ***"No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending, and if,***

***by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode.*"**

4.3. The House of Lords in ***L'Office Cherifien des Phosphates v. Yamashita Shinnihon Steamship Co. Ltd.*** observed that the question of fairness will have to be answered in respect of a particular statute by taking into account various factors, viz., value of the rights which the statute affects; extent to which that value is diminished or extinguished by the suggested retrospective effect of the statute; unfairness of adversely affecting the rights; clarity of the language used by Parliament and the circumstances in which the legislation was created. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity is so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say."

5. It was again held by the Supreme Court in ***Hitendra Vishnu Thakur v. State of Maharashtra (1994) 4 SCC 602)*** in the context of the amendment amending section 167 (2) of the Code :-

> ***"26. The Designated Court has held that the amendment would operate retrospectively and would apply to the pending cases in which investigation was not complete on the date on which the Amendment Act came into force and the challan had not till then been filed in the court. From the law settled by this court in various cases the illustrative though not exhaustive principles which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation may be culled out as follows:***
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> ***(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is***

textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

> ***(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implicatio*****n**."

5.1. It was again held by the Supreme Court in ***Shiv Shakti Coop. Housing Society, Nagpur v. M/s. Swaraj Developers & Ors. (AIR 2003 SC 2434)*** that no person has a vested right in a course of procedure and if by a statutory change the mode of procedure is altered the parties have to proceed according to the altered mode, without exception, unless there is a different stipulation.

5.2. It is recently held by the Supreme Court in para 10 in ***Vijay v. State of Maharashtra & Ors. (2006) 6 SCC 289)*** that ordinarily a statute is construed to have prospective effect, but the same rule does not apply to a disqualifying provision. The inhibition against retrospective construction is not a rigid rule. It does not apply to a curative or

a clarificatory statute. If from a perusal of the statute, intendment of the legislature is clear, the court will give effect thereto. For that purpose, the general scope of the statute is relevant. Every law that takes away the right vested under the existing law is retrospective in nature. The Supreme Court observed that, it is now well settled that when a literal reading of the provision giving retrospective effect does not produce absurdity or anomaly, the same would not be construed to be only prospective. The negation is not a rigid rule and varies with the intention and purport of the legislature, but to apply it in such a case is a doctrine of fairness. When a law is enacted for the benefit of the community as a whole, even in the absence of a provision, the statute may be held to be retrospective in nature.

5.3. It was earlier held by the Supreme Court in ***Boucher Pierre Andre v. Supdt., Central Jail, Tihar*** while construing the beneficial provisions of section 428 of the Code that, where an accused person was convicted and he was still serving his

sentence on the date when the new Code came into force, section 428 would apply and he would be entitled to claim that the period of detention undergone by him during the investigation, inquiry or trial of the case should be set off against the term of imprisonment imposed on him and he should be required to undergo only the remainder of the term.

6. From the above discussion of facts and relevant legal propositions, it would clearly appear that, even as the legal position regarding the cause of action arising from the dishonour of cheque for the second time was not clear and settled and the petitioner had not raised the issue of limitation at the initial stage, the court would have been perfectly justified in taking cognizance of the complaint after condoning the delay on the finding that the complainant had sufficient cause for not making a complaint within the period of limitation. It can hardly be disputed that the amendment of the provisions of section 142 of the Act amended the procedure for taking cognizance and could not and did

not affect any vested right. The bar against taking cognizance, as it existed prior to the amendment of 2002, did not create any right in favour of the accused person but expressly placed an embargo against the court. Not only that the matter of, the manner in which and the condition subject to which court takes cognizance of an offence, is a matter of procedure contained in the Code of Criminal Procedure, the provisions of section 142 carves out a special procedure for the purpose of trying the offence punishable under section 138 of the Act. It cannot be gainsaid that the amendment adding the proviso to clause (b) of section 142 was an amendment of the procedural aspect and, therefore, should have retrospective effect.

7. Even otherwise, under the provisions of section 465 of the Code, no finding, sentence or order passed by a Court of competent jurisdiction can be reversed or altered by a court of appeal confirmation or revision on account of any error, omission or irregularity in the order or other proceedings before or during the trial unless failure

of justice had in fact been occasioned thereby and in determining whether any error, omission or irregularity in the proceedings had occasioned failure of justice, the court has to consider whether the objection could and should have been raised at an earlier stage of the proceedings. In the facts of the present case, the petitioner has chosen to take one ground after the other and set its sail according to the changing winds while trial of the offence, required to be tried summarily, is already delayed by a decade.

8. Therefore, in the facts and for the reasons discussed hereinabove, it is held that the amendment of section 142 by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 would have retrospective effect at least for the pending cases, and in view of the admitted facts of the case, there was sufficient cause for not making a complaint within the prescribed period, and the court would have been justified in taking cognizance of the complaint after the period of limitation. In view of these findings and the provisions of section 465 of

the Code, this court would not be justified in either interfering with the impugned order or in ordering dropping of the proceedings on the ground that the court had no jurisdiction to take cognizance of the offence under the provisions of section 142 of the Act when the cognizance was taken by the court. The petition is, therefore, dismissed. Rule is discharged and interim relief is vacated with no order as to cost.

9. At this stage, learned counsel Mr Shah requested to continue the interim relief, operating since March 1998, against further proceedings in the trial court to allow the petitioner to approach the higher forum. Accordingly the interim relief of stay of further proceedings of Criminal Case No.1863/96 pending in the Court of learned JMFC at Gandevi is ordered to continue till the expiry of eight weeks from today.

sd/-
[D. H. Waghela, J.]

msp